IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ———.

HARRY PORETSKY, ARTHUR W. MACHEN, Trustee, and THOMAS MACHEN, *Petitioners,*

v.

JULIUS H. WOLPE, ET AL., and CHARLES W. KUTZ, ET AL., as Members of the Zoning Commission of the District of Columbia, *Respondents.*

BRIEF OF PETITIONERS.

When this case was presented to the United States Court of Appeals for the District of Columbia the principal issue was the appealability of the order of the District Court denying the respondents Wolpe et al, leave to intervene in the main case, they having sought such intervention under F. R. C. P. 24 (b)(2) (Permissive Intervention), after the judgment in the main action had been entered and carried out. The Appellate Court avoided that issue and disregarded the established principles enunciated by this Court in *United States* v. *California Co-op. Canneries,* 279 U. S. 553, 556, 73 L. ed. 838, 841, 49 Sup. Ct. Rep. 423, *Allen Calculators, Inc.,* v. *National Cash Register Co.,* — U. S. —, 88 L. ed. Advance Opinions 874, and other cases.

STATEMENT OF THE CASE.

The facts have been stated in the petition for the writ of certiorari (p. 3), and therefore are not repeated in this brief.

ARGUMENT.

I.

F. R. C. P. 24 Does Not Permit Intervention in an Action Against a Zoning Commission by Persons Having No Direct and Immediate Legal Interest in the Property Which is the Subject Matter of the Action.

F. R. C. P. 24 includes within itself the comprehensive inventory of the allowable instances for intervention. The basic principle underlying the rule is that the intervener shall have a direct and immediate legal interest in the property which is the subject matter of the action. That interest must be a specific legal interest and not a general interest, and must be asserted by a timely application. Without special statutory right, intervention will lie basically only "when the representation of applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action" (F. R. C. P. 24 (a)(2)); or "when an applicant's claim or defense and the main action have a question of law or fact in common." (F. R. C. P. 24 (b)(2)).

First consider the matter of "interest."

> "It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights."
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> *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. (2d) 940, 942 (1933).
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> *Re Leaf Tobacco Board of Trade*, 222 U. S. 578, 56 L. ed. 323, 32 Sup. Ct. Rep. 833.

Jewell Ridge Coal Corp. v. *Local 6167 United Mine Workers, etc.*, 7 Fed. Rules Service 460, 462, 463, 3 F. R. D. 251.

The Zoning Commission of the District of Columbia as the guardian of the public interest defended the present action, as it was exclusively authorized to do by the zoning law. (Appendix p. 27)

In *San Antonio Utilities League* v. *Southwestern Bell Telephone Company*, 86 F. (2d) 584, 585 (C. C. A. 5th, 1936) the court said:

> "That, generally speaking, individual subscribers have no direct and immediate interest in a rate controversy and suit sufficient to authorize them to maintain or prosecute it, and that the matters involved in such a suit are matters entirely between the parties to it, the Utilities and the City, is settled by the authorities first above cited." *

Respondents Wolpe, et al. had no ownership of or financial interest in the Parcel of land to restore the prior existing zoning of which was the basis of the action by Poretsky and the Machens as plaintiffs against the Zoning Commission of the District of Columbia as defendant. At no point was their property adjoining or contiguous to said Parcel. Not only were their properties separated from said Parcel by public streets, but most of their said properties were one or more city blocks distant from said Parcel. Since there was no violation of the zoning law, none of the respon-

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* In support of this position the court referred to:

Re Englehard & Sons, 231 U. S. 646, 34 S. Ct. 258, 58 L. Ed. 416.

New York v. *New York Tel. Co.*, 261 U. S. 312, 43 S. Ct. 372, 67 L. Ed. 673.

New York v. *Consolidated Gas Co.*, 253 U. S. 219, 40 S. Ct. 511, 64 L. Ed. 870.

O'Connell v *Pacific Gas & Electric Co.* (C. C. A.), 19 F. (2d) 460.

Wright v. *Central Kentucky Natural Gas Co.*, 297 U. S. 537, 56 S. Ct. 578, 80 L. Ed. 850.

dents Wolpe et al. had any statutory right of action (D. C. zoning law, 1940 Ed. D. C. Code Title 5, Sec. 422, p. 145; Appendix p. 28). When they purchased their properties Wolpe et al. knew, or by inquiry (even by telephone), could have ascertained, that the whole of said Parcel had been zoned as an apartment house site as early as 1933 (R. 52).

> "An intervener should have some interest in or claim to the demand in suit, or some connection with, interest in, or lien upon the subject-matter of the litigation, and the appellant has none of these. * * * Appellant's claim is, in respect of the subject-matter of the suit, neither with nor against any of the parties, and in a legal sense it cannot be affected by the decree. It is so remote as not to have challenged the discretion of the trial court."
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> *Glass* v. *Woodman*, 223 Fed. 621 (C. C. A. 8th 1915).

Since Wolpe et al. had no "interest" in the subject-matter of the action, the question of their "representation" in the action established no basis for intervention. But, in spite of this, the record shows that the Principal Assistant Corporation Counsel of the District of Columbia actively defended the action for the Zoning Commission (R. 30). The only complaint of respondents Wolpe et al. of alleged "inadequate" representation is that shortly after the suit was filed many of said respondents "offered their services to the Corporation Counsel's office in the trial of this case and in the giving of testimony, and were told that they would be called upon if needed," and that no request was made to them to assist (R. 63, 64). That is not the "inadequate" representation contemplated by F. R. C. P. 24 (a)(2).

> "Clause (2) of subdivision (a) relates to cases in which the applicant for intervention has an interest in the action represented by a party so that the applicant may be bound by a judgment in the action. The question of adequacy of representation does not arise unless the applicant is represented in the action. Neither Mokan, as a substantial stockholder of Pan-

handle Eastern, nor Panhandle Eastern, is represented by the United States. The interest of either of them will not be bound by a judgment on the supplemental complaint * * *. Petitioner has no right to encumber the main action which is being conducted by the Attorney General with extraneous issues of a private nature. United States v. Radio Corp., D. C. 3 F. Supp. 23, 25. United States v. Northern Securities Co., C. C. 128 F. 808, 813".

U. S. v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 119 (D. Del. 1939) app. dismd. 108 F. (2d) 614, cert. den. (1940) 309 U. S. 687, 60 S. Ct. 887, 84 L. ed. 1030.

But even "inadequate representation" alone is not sufficient to warrant intervention. F. R. C. P. 24 (1)(a) provides "*and* the applicant is or may be bound by a judgment in the action." Being (1) inadequately represented *and* (2) bound by the judgment are both required. Certainly Wolpe et al. could not have been bound by the judgment. That judgment vacated the order of November 7, 1941 of the Zoning Commission, enjoined the Zoning Commission from enforcing said order, and directed the restoration of the zoning existing prior to the date of said order (R. 56). The District Court found as a fact that the action of the Zoning Commission in rezoning Parcel 70/100 on November 7, 1941, as aforesaid, "was unreasonable, arbitrary, capricious and void and should be vacated and set aside" (R. 55). The Zoning Commission by its order of November 7, 1941 had unlawfully invaded the rights of petitioners Poretsky and Machen (R. 45, 53-55) in clear violation of the principles laid down by this Court in *Nectow* v. *Cambridge*, 277 U. S. 183, 72 L. ed. 842, and by the United States Court of Appeals for the District of Columbia in *Bugher* v. *Gottwals*, 60 App. D. C. 340, 341, 54 F. (2d) 451, and in *Hazen* v. *Hawley*, 66 App. D. C. 266, 272, 86 F. (2d) 217; and by the Circuit Court of Appeals of the 4th Circuit in *Radford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. (2d) 940. Therefore, the judgment

of the District Court could not possibly have been directed against or been binding upon anyone but the Zoning Commission, even if the respondents Wolpe et al. had been made original parties. Manifestly, therefore, F. R. C. P. 24 did not apply and could not legally be invoked.

> "The rule provides that, in exercising discretion as to intervention of this character, the Court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the Court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the Court."
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> *Allen Calculators, Inc.* v. *National Cash Register Co.*, ... U. S. ...., 88 L. ed. Advance Opinions 874.

The application of the proposed intervenors, respondents Wolpe et al., was therefore properly denied because (1) they had no legal, direct or immediate interest in the subject matter of the main action; (2) their "interest" was general and public and was adequately represented by the Zoning Commission; (3) they were not bound by the judgment in the main action; (4) they had no claim or defense legally justiciable in the main action or presenting a question of law or fact in common with the matter involved in the main action; (5) their application for intervention was not timely; and (6) their said application would have and has unduly and improperly prejudiced the adjudication of the rights of the original parties by delaying the realization of the benefits of the judgment rendered and carried out before the application for intervention was filed.

If the Zoning Commission had originally denied the petition for rezoning, certainly Wolpe et al. would have had no legal right to file an action to compel a change of zoning

or to enjoin the decision of the Zoning Commission. The reason for this is apparent. Wolpe et al. had no control over the determinations of the Zoning Commission or any interest in the property affected by the zoning. Conversely the judgment rendered against the Zoning Commission did not bind Wolpe et al. Nor had they any legal right to appeal the judgment when the Zoning Commission, exercising the discretion vested in it alone by law, unanimously refused to take such an appeal (R. 75). No law or decision has been or can be cited authorizing the substitution of the decision of the proposed intervenors Wolpe et al. for the discretion and determination of the Zoning Commission in the matter of taking an appeal from a judgment rendered against it. There are over 150 persons in this case among the respondents Wolpe et al. but each has only a general or public interest, not the "legal interest" required by law as a prerequisite to intervention. The decision of the United States Court of Appeals for the District of Columbia held that each had such a "vital interest" as to entitle him to intervene as a matter of right under F. R. C. P. 24(a)(2) although these proposed intervenors expressly sought only permissive intervention under F. R. C. P. (24) (b) (2). But a general interest, a public interest, even a "vital interest" (R. 87) does not justify intervention.*

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* *Re Leaf Tobacco Board of Trade*, 222 U. S. 578, 581, 56 L. ed. 323, 32 Sup. Ct. Rep. 833;
New York v. *Consolidated Gas Co.*, 253 U. S. 219, 64 Law ed. 870, 40 Sup. Ct. Rep. 511;
New York v. *N. Y. Telephone Co.*, 261 U. S. 312, 67 Law ed. 673, 43 Sup. Ct. Rep 372.
San Antonio Utilities League v. *Southwestern Bell Telephone Co.*, 86 F. (2d) 584 (C. C. A. 5th, 1936).

II.

Analysis of the Opinion of the United States Court of Appeals for the District of Columbia.

The opinion of the United States Court of Appeals for the District of Columbia is inherently erroneous. The statement of the "question presented by the record," (R. 86) is inaccurate. It says that the proposed interveners were "adjoining property owners" when in fact the record shows that the Parcel involved in the main action consisted of a city block separated from surrounding property on three sides by public streets and abutting a public park on the fourth side (R. 46). The property of the nearest proposed intervener is situated diagonally across Seventeenth and Shepherd Streets in another city block and does not adjoin said Parcel. The properties of the other proposed interveners are even farther away, some of them two or more blocks distant from the Parcel aforesaid (R. 67). Also, the so-called question assumes, without any proof whatever, that the enforcement of the challenged zoning order of November 7, 1941 "affects the value or use" of the property of the proposed interveners, in spite of the finding of the trial court that "the erection of an apartment building under the Residential 60-foot 'A' area zoning would not affect adversely the residential characteristics of the Crestwood area or reduce land values in that section" (R. 52), and that "the erection of an apartment building upon this property would not impair the health, safety, morals, convenience, order, prosperity or general welfare of the surrounding area or the District of Columbia" (R. 55).

Section 10 of the Zoning Law of the District of Columbia (D. C. Code 1940, Title 5, Sec. 422) gives to "the corporation counsel of the District of Columbia or any neighboring property owner or occupant who would be specially damaged by any such violation" of the zoning law a right of action to prevent or abate a violation of said Zoning Act.

In the instant case there was no violation of said Zoning Act. Therefore, no statutory or other right of action arose in favor of the respondents Wolpe et al. The court below ignores the fact that there was no violation of the zoning law but, basing its opinion nevertheless upon Title 5, Sec. 422, aforesaid, says "their right to bring that independent action is the basis of appellants' (respondents here) right to intervene in this case." In support of this position the Court says in a footnote (R. 86) "Such a right was allowed by this Court prior to the present Zoning Act. *Hazard* v. *Blessing*, 55 App. D. C. 114, 2 F. (2d) 916 (1924)." The fact is that the zoning law was passed in 1920 and *Hazard* v. *Blessing* was decided four years thereafter in 1924, and the decision in that case *was* predicated upon a *violation* of the zoning law. That case is, therefore, no authority for the position taken by the court below in the present case.

Upon the foregoing erroneous premise the court said (R. 86): "It follows from Rule 24 (a) that appellants (respondents Wolpe et al.) may intervene as of right in this case provided (1) that the representation of their interest by the Zoning Commission is or may be inadequate, and (2) that their application is timely." This is a definite misconstruction of F. R. C. P. 24 (a) (2), which provides that intervention of right shall be permitted "when the representation of the applicant's interest by existing parties is or may be inadequate *and the applicant is or may be bound by a judgment in the case.*" (Italics supplied.) Representation and timeliness are not joined, but being represented and being bound by the judgment are.

> *Allen Calculators, Inc.* v. *National Cash Register Co.*, ... U. S. ...., 88 L. ed. Advance Opinions 874, 876.

To support its position that Wolpe et al. "may intervene as of right" the court below cites *U. S.* v. *Lane Lifeboat Co.*, 25 F. Supp. 410 (1938). But the facts in that case disclose the following situation: The United States entered

into contracts with the defendant Lifeboat Co. for lifeboats. The defendant Hartford Accident and Indemnity Co. executed performance bonds in favor of the Government for the manufacture of the lifeboats, and the Lifeboat Co. and the Indemnity Co. undertook to hold the Government harmless of any liability resulting from the purchase of the lifeboats, including any liability that might arise from the embodiment therein of a patented invention. The Government sued the Lifeboat Company and the Hartford Company to recover damages paid by it for an alleged patent infringement. Krolman, the president of the Lifeboat Co., had as an individual executed an indemnity agreement to indemnify the Hartford Co. for any moneys which it might be required to pay as a consequence of having executed the bonds. Krolman sought to intervene in the main action. The court said that it was "clear that any judgment rendered against the insurance company would enable the insurance company to proceed against its indemnitors", and that Krolman as an indemnitor would be ultimately bound by the judgment against the insurance company. Because of conflict between Krolman and the attorney for the Lifeboat Co. the Court also found that Krolman's interest was inadequately represented. In law, in fact and in principle the Lifeboat case does not support the position of the United States Court of Appeals for the District of Columbia in the present case.

That court also held that "the failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interest of the interveners was inadequate" (R. 87). Again the court below, it is respectfully submitted, is in error. The determination to take an appeal rested exclusively in the discretion of the Zoning Commission, and in reaching its decision not to appeal it was unanimous, although it had passed its challenged rezoning order of November 7, 1941 by a three to two vote. What could be more within the discretion of an administrative body such as the Zoning Commission than to refuse to take an appeal

from a solemn judgment of the District Court entered after full trial? It is obvious that the Zoning Commission realized that a majority of its members had committed an error in attempting to change the zoning of said Parcel. It certainly had the right to restore a prior existing zoning after the District Court had pointed out that the Zoning Commission's order of November 7, 1941 was "unreasonable, arbitrary, capricious and void" (R. 55).

F. R. C. P. 24 (a)(2) provides that the applicant must not only show inadequate representation but also that he would be bound by the judgment. No such showing is made in this case. "The question of adequate representation does not arise unless the applicant is represented in the action."

U. S. v. *Columbia Gas & Electric Corp.*, *supra*, p. 13

That is, that the applicant must have a legal, direct and immediate interest as distinguished from a general and public interest and must be bound by the judgment.

The court below held further (R. 87) that "Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected." That holding is directly opposed by the many decisions of this Court as shown in Section III of this brief. *U. S. Casualty Co.* v. *Taylor*, 64 F. (2d) 521, 527 (C. C. A. 4th 1933), cited in the opinion below to support the court's holding, was a case under the Longshoremen's Act (33 U. S. C. A. 901-950) and the applicant for intervention therein was the employer's insurance carrier, which had been a party to the proceedings before the deputy commissioner, and would have been bound by the judgment rendered against said employer, although it was not a technical party. "The District Court vacated the decree and granted the petition, making the casualty company a party defendant upon condition that it adopt the answer of the deputy commissioner and be bound by the testimony that had been taken. Thereafter a formal decree was entered, whereby the prior de-

cree was confirmed against the deputy commissioner and the casualty company" (p. 525). The Circuit Court of Appeals sustained the order of intervention under Equity Rule 37 (28 U. S. C. A. Sec. 723) which permitted intervention at any time. In that case the judgment had not been carried out, the intervener did not seek to "prejudice the adjudication of the rights of the original parties," but actually submitted itself to the judgment of the court. In the case at bar the proposed interveners were mere interlopers.

The reasoning and theory of the opinion of the court below is manifestly derived from the case of *Rosenberg* v. *Mehl*, 37 Ohio App. 95, 174 N. E. 152 (1930) (R. 87). But that case depended upon a statute providing that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of a question involved therein." There is no such statutory authority for intervention in the District of Columbia. Furthermore, in the Rosenberg case a violation of the zoning law was involved, while no such violation exists in the case at bar. The rights of neighboring property owners who are specially damaged are limited by the zoning law of the District of Columbia (D. C. Code 1940, Title 5, Sec. 422) to cases in which a violation of the zoning law is involved. That was not true in the Rosenberg case.

In the Ohio case Rosenberg's property was "contiguous" to that of the plaintiff Mehl. The properties of none of the respondents Wolpe et al. adjoin or are contiguous to the Parcel involved in the instant case. Contiguity was deemed so essential in the Ohio case that although a group of the neighbors had sought intervention, the court limited to Rosenberg the right to be made a party because only his property was contiguous to that of the plaintiff Mehl.

Therefore, even under the Ohio case, which underlies the opinion of the court below, two basic elements existed which do not exist in the case at bar: (1) contiguity and (2) a violation of the zoning law.

Finally the court below declared (R. 87) that "had the intervention been permissive we think it would have been an abuse of discretion to deny it under the circumstances of this case. *Adjoining* property owners in a suit to vacate a zoning order have such a *vital interest* in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown." (Italics supplied.) The "compelling reasons" appear in F. R. C. P. 24, in the Zoning Act, and in the fact that none of the proposed interveners were "adjoining property owners." No "vital interest" is recognized under the established law or the Federal Rules of Civil Procedure.

III.

The Denial of Respondents' Application for Permissive Intervention was Within the Discretion of the District Court and was Not Appealable.

The motion of respondents Wolpe et al. was grounded solely upon "Permissive Intervention" F. R. C. P. 24 (b) (2), (R. 57). Nevertheless the United States Court of Appeals for the District of Columbia held that the motion should have been based upon F. R. C. P. 24 (a) (2), (R. 87), "Intervention of right." That this was clearly erroneous has been shown. But aside from the fact that the alleged "claim or defense" of Wolpe et al. and the main action did not and could not present a "question of law or fact in common," the United States Court of Appeals for the District of Columbia was confronted with but disregarded the established rule of this Court that an order denying leave to intervene is not appealable.

Allen Calculators, Inc. v. *National Cash Register Co.*, ... U. S. ...., 88 L. ed. Advance Opinions 874.

In *United States* v. *California Co-op Canneries*, 279 U. S. 553, 556, 73 L. ed. 838, 841, 49 Sup. Ct. Rep. 423, the court said:

"The supreme court denied leave to intervene. The Canneries appealed to the court of appeals. That court, so far as appears, did not consider the question whether, in view of the Expediting Act, it had jurisdiction on appeal. *It did not refer to the decisions which hold that an order denying leave to intervene is not appealable* (Ex parte Cutting, 94 U. S. 15, 24 L. ed. 49; Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; Re Leaf Tobacco Board of Trade, 222 U. S. 578, 581, 56 L. ed. 323, 32 Sup. Ct. Rep. 833; Re Engelhard & Sons Co., 231 U. S. 646, 58 L. ed. 416, 34 Sup. Ct. Rep. 258; New York v. Consolidated Gas Co., 253 U. S. 219, 64 L. ed. 870, 40 Sup. Ct. Rep. 511; New York v. New York Teleph. Co., 261 U. S. 312, 67 L. ed. 673, 43 Sup. Ct. Rep. 372), except where he who seeks to intervene has a direct and immediate interest in a res which is the subject of the suit (compare French v. Gapen, 105 U. S. 509, 524-526, 26 L. ed. 951, 956, 957; Smith v. Gale, 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674; Leary v. United States, 224 U. S. 567, 56 L. ed. 889, 32 Sup. Ct. Rep. 599; Swift v. Black Panther Oil & Gas Co., 156 C. C. A. 448, 244 Fed. 20, 30). Nor did it refer to the *settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made.*" (Italics supplied)*

In *San Antonio Utilities League* v. *Southwestern Bell Telephone Company*, 86 F. (2d) 584 (C. C. A. 5th, 1936), the Telephone Company had sued the City of San Antonio, Texas, et al., in contested litigation over telephone rates. The litigation had continued over years and on the day the parties to the main action submitted to the Court a consent decree, the League, purporting to represent five

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* *Smith* v. *Gale*, 144 U. S. 509, 520, 36 L. Ed. 521, 524, 525, 12 Sup. Ct. Rep. 674.
American Book Co. v. *Kansas*, 193 U. S. 49, 52, 48 L. Ed. 613, 614, 24 Sup. Ct. Rep. 394.
United States v. *Northern Securities Co.*, 128 Fed. 808, 810.
Board of Drainage Com'rs. v. *Lafayette Southside Bank*, 27 F. (2d) 286, 293 (C. C. A. 4th, 1928).
Radford Iron Co. v. *Appalachian Electric Power Co.*, 62 F. (2d) 940 (C. C. A. 4th, 1933).

thousand or more telephone subscribers, made an unsuccessful attempt to intervene in the suit in order to oppose the entry of the consent decree. The application for intervention was denied, and the appeal therefrom dismissed.

"Appellees, urging that the order was discretionary and not appealable, have moved on the authority of In re Englehard & Sons, 231 U. S. 646, 34 S. Ct. 258, 58 L. Ed. 416; City of New York v. New York Tel. Co., 261 U. S. 312, 43 S. Ct. 372, 67 L. Ed. 673; New York v. Consolidated Gas Co., 253 U. S. 219, 40 S. Ct. 511, 64 L. Ed. 870; O'Connell v. Pacific Gas & Electric Co. (C. C. A.) 19 F. (2d) 460, and Wright v. Central Kentucky Natural Gas Co., 297 U. S. 537, 56 S. Ct. 578, 80 L. Ed. 850 to dismiss the appeal.

Appellants, recognizing the general rule to be that an order denying leave to intervene is a discretionary order, and therefore not a final one from which an appeal will lie, insist that their case is one of, and their motion presents, exceptional circumstances, taking the order appealed from here out of that rule.

We do not think so. *To the thoroughly settled rule that an order denying leave to intervene is not appealable,* In re Cutting, 94 U. S. 14, 15, 24 L. Ed. 49; Credits Commutation Co. v. United States, 177 U. S. 311, 20 S. Ct. 636, 44 L. Ed. 782, there is only one substantial exception, that he who seeks to intervene has a direct and immediate interest in *a res* which is the subject of the suit. United States v. California Cooperative Canneries, 279 U. S. 553, at page 556, 49 S. Ct. 423, 73 L. Ed. 838; Lupfer v. Carlton (C. C. A.) 64 F. (2d) 272; Burrow v. Citizens' State Bank (C. C. A.) 74 F. (2d) 929, 930. That, generally speaking, individual subscribers have no direct and immediate interest in a rate controversy and suit sufficient to authorize them to maintain or prosecute it, and that the matters involved in such a suit are matters entirely between the parties to it, the Utilities and the City, is settled by the authorities first above cited. (Italics supplied)

Demulso Corp. v. *Tretolite Co.*, 74 F. (2d) 805 (C. C. A. 10th 1934).

White v. *Hanson,* 126 F. (2d) 559 (C. C. A. 10th 1942).

Baltimore Trust Co. v. *Interocean Oil Co.*, 30 F. Supp. 484, 485.

See also *Land Title & Trust Co.* v. *Asphalt Co.*, 127 Fed. 1, 21 (C. C. A. 3d, 1903).

IV.

The Denial by the District Court of the Motion of Respondents Wolpe et al. for Leave to Intervene Was Not an Abuse of Its Discretion.

The motion of respondents Wolpe et al, for leave to intervene was filed *after* the judgment in the main action had been rendered and carried out by the defendant Zoning Commission and *after* the time had expired within which a motion for a new trial could be made or an appeal could be taken. That motion expressed two objects: 1, a new trial in the main action or, in the alternative, 2, to be allowed to appeal the judgment (R. 57).

1. As to the motion for a new trial in the main action, it need only be said that the final judgment in the main action had been entered April 7, 1943 (R. 55). F. R. C. P. 59 (b) limits the time for serving a motion for a new trial to ten days after the entry of judgment. Therefore, after April 17, 1943 a motion for a new trial was too late. The motion of respondents Wolpe et al. was filed May 6, 1943 (R. 57) and was *not* accompanied by a proposed intervening petition as required by F. R. C. P. 24 (c). A proposed intervening petition was filed May 8, 1943 (R. 57), a day after the time to appeal had expired under Rule 10 of the then existing General Rules of the United States Court of Appeals for the District of Columbia. (Appendix p. 29) Obviously the Court could not have entertained that motion for leave to intervene for the purpose of moving for a new trial. The opinion of the District Court expressly so decided (R. 77). That the motion for a new trial was not timely is apparently conceded by said respondents.

But in addition to this the trial court decided as a fact that aside from the limitation imposed by the F. R. C. P. 59 (b), the motion for a new trial "would have been overruled on its merits" (R. 77). The Court had recently completed the trial of the main action. He had made a personal inspection of the property involved and of the neighborhood. He had found "nothing stated in the intervening petition that would change my (his) views of the case even if the interveners were made parties to the suit" (R. 77). The exercise of the Court's judgment in this regard is manifestly not an abuse of discretion.*

2. The denial of the leave to appeal the judgment was properly, because (1) the movants Wolpe et al. had no legal interest in the property involved in the main action; (2) the motion was not timely;[1] (3) the final judgment had been entered and performed; (4) the Zoning Commission was the only authority vested in law with the determination of the question whether an appeal should be taken and it had unanimously decided not to appeal; (5) the motion sought to impeach said final judgment in the main action.

In *U. S. v. Columbia Gas & Electric Corp., supra,* (p. 13 hereof) the Court said:

> "It is improbable that the Supreme Court in promulgating this new rule intended to destroy well established principles as the basis of intervention as of right. It would produce chaos to require the courts to recognize the absolute right to intervention of stran-

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* *Rich* v. *Lemmon*, 15 App. D. C. 507, 509.
Ecker v. *Potts*, 72 App. D. C. 174, 112 F. (2d) 581.
American Brake Shoe & Foundry Co. v. *Interborough Rapid Transit Co.*, 112 F. (2d) 669, 670 (C. C. A. 2d, 1940).
Palmer v. *Guaranty Trust Co.*, 111 F. (2d) 115, 117 (C. C. A. 2d, 1940).

[1] See Rule 10, General Rules, U. S. Ct. App. D. C., Appendix p. 29).

gers who had no legal or equitable interest in the subject matter of the action."

O'Connell v. *Pacific Gas & Electric Co.*, 19 F. (2d) 460 (C. C. A. 9th)

CONCLUSION.

F. R. C. P. 24 was not intended to take away from an administrative body like the Zoning Commission of the District of Columbia (1) the control of litigation in which it is a party, or (2) its discretion relating to an appeal from a judgment against it. Without a violation of the zoning law, which in and of itself defines the rights of neighboring property owners specially damaged by such violation, the proposed interveners have no legal rights or interests entitling them to intervene under the comprehensive inventory of allowable instances for intervention provided in F. R. C. P. 24. The Zoning Act vests in the Zoning Commission guardianship of the interests of the proposed interveners, and after the Zoning Commission determines that no appeal is to be taken and that it will carry out the judgment of the court, no application for intervention is timely or warranted. Further, respondents' application for leave to intervene came too late.

The writ of certiorari should be granted.

All of which is respectfully submitted.

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